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ICC STAFF REBUTTAL TO MEC's "FACT SHEET" ON SB 2525

Ex Parte Concerns

Because of concerns over the restrictions and requirements imposed by the various statutes involving ex parte communications to which the agency as a whole is subject (see 5 ILCS 100/10-60; 5 ILCS 430/5-50; 220 ILCS 5/10-103; 83 Ill. Adm. Code 200.710), the Commissioners found it advisable not to take a position on the legislation while SB 2525 was under consideration by the General Assembly; at that time, Docket No. 03-0659 was pending before the ICC. Since the entry of an Order in Docket No. 03-0659, two related matters have commenced and are pending before the ICC. Therefore, the Commission continues to be subject to these same ex parte statutes. The Commission, without expressing either agreement or disagreement with its contents, does not object to circulation by Commission Staff of this position paper in which Staff articulates its concerns.

MEC Statement

ICC staff has said that SB 2525 would have a negative impact on competition within the state. NOT TRUE.

- It is the veto that is greatly harming competition. If the veto is not overridden, MidAmerican, one of the largest providers of competitive electric and gas services in the state, will be effectively forced out of the competitive gas market in Illinois. With gas market prices expected to exceed \$8 per MMBtu this winter, Illinois needs more gas competitors; not fewer.

ICC STAFF REBUTTAL

The ICC Staff has two responses to this statement.

First, MEC is simply NOT being forced out of the competitive gas business. Nothing in law or Commission rules prevents MEC from forming an affiliate to engage in that business.

Second, Staff notes that, unlike other Illinois natural gas utilities, MEC has virtually no competitive sellers of natural gas in its service territory. While there are very significant numbers of non-utility natural gas sellers operating in Illinois, very few operate in MEC's service territory. (According to Staff's research on this issue as of its last report to the Commission, there are over 80 non-utility suppliers of gas in Illinois, but Staff was able to account for only two of those suppliers working in MEC's service territory.) That reduced level of competition advantages MEC, but it hurts competition and the potential purchasers of competitively-priced natural gas. At least some of the customers that returned to MEC's tariffed service have complained to

Commission Staff that they were unable to get any offers from other non-utility sellers of gas competitive with MEC's utility-based price. The absence of competitive offers could be explained by MEC's selling "competitive" gas at below the competitive level in its service territory.

Staff believes that upholding the Governor's veto of SB 2525 opens the door to more competitors in MEC's territory. For example, in its filing on August 12, 2004, in a case dealing with this issue, an alternative gas supplier, Constellation NewEnergy ("NewEnergy Gas") stated: "As it stated in its initial intervention in this proceeding, NewEnergy Gas stands ready and willing to provide service to the identified MidAm customers, under either long-term contracts to replace the MidAm contracts at issue, or on a short-term basis to allow the customers additional time to select a competitive supplier. NewEnergy Gas committed to provide this service effective June 1, 2004...and remains willing to serve MidAm customers effective September 1, 2004."

MEC is contending that Commission Staff is supporting an action, the Governor's veto of SB 2525, that harms competition in natural gas sales in Illinois. Actually, Commission Staff, and the Commission itself, have comprehensively supported and advanced competition in natural gas for at least two decades. There is no reason for anyone to believe that, in this one instance, Commission Staff has undergone a sudden reversal of course and is now seeking to harm competition.

MEC Statement

ICC staff has suggested MidAmerican can continue to serve competitive customers under an existing Illinois statute. STAFF'S ACTIONS ARE AT ODDS WITH ITS SUGGESTION.

- When MidAmerican attempted to continue service to Deere & Co, Moline Forge and Trinity Hospitals — customers that had chosen MidAmerican's competitive service — under the statute cited by ICC staff, the ICC staff opposed MidAmerican's continued service to these customers, forcing them to cancel MidAmerican's lower-cost service and switch to more costly service.

ICC STAFF REBUTTAL

Commission Staff has told MEC that it is free to form an affiliate to sell natural gas in the competitive market. But the law, confirmed by the Commission in its order in the Declaratory Petition docket (cited above), does not permit an Illinois natural gas public utility to provide service to the public except under tariffed rates approved by the Commission.

MEC Statement

ICC staff has proposed that MidAmerican could create a new corporate affiliate to participate in the competitive gas market. STAFF'S PROPOSAL IS INEQUITABLE AND UNFAIR

- MidAmerican has been making competitive gas sales through a division of the utility without complaint for over ten years.
- No other competitor has been required to create a separate corporation, and forcing MidAmerican to do so would put it at a competitive disadvantage.

ICC STAFF REBUTTAL

MEC has contended, without logic and reason, that the rules which apply to other natural gas utilities in Illinois, that is, that making sales of natural gas at other than Commission-approved tarified rates must be a business conducted only through a non-utility affiliate, should not apply to MEC. Every natural gas utility in Illinois that desires to make “competitive” sales of natural gas at other than tarified rates is prohibited from doing so by the Public Utility Act. Any of those utilities, however, could make such “competitive” sales through an affiliate. MEC, however, simply does not want to create an affiliate since it contends that it cannot profitably do so. MEC’s explanation involves its position as a gas and electric utility as well as its corporate strategy and Illinois law. MEC insists that any competitive affiliate it forms must be able to sell both electricity and gas, which Illinois law apparently prevents. Staff believes that this is a poor reason to permit MEC to engage in activity that potentially harms the public interest. One explanation for MEC’s refusal to engage in competitive sales through an affiliate is that it would be less lucrative for the utility to do so.

As far as the issue of having made “competitive” sales for over ten years without complaint is concerned, Commission Staff only learned of MEC’s practice within the last year and immediately advised MEC that the practice should be stopped. It is entirely understandable that no complaints would be received from customers taking advantage of MEC’s “competitive” sales when the economic advantages from those sales may have been subsidized by MEC’s tarified customers.

MEC Statement

ICC staff has argued that SB 2525 would impact the state’s finances. NOT ACCURATE.

- MidAmerican’s competitive gas business will continue to pay the same taxes as other providers of competitive gas service. SB 2525 also doesn’t impact payments of the Public Utility Fund tax since that tax is not assessed on competitive commodity service in Illinois.
- The ICC should not require additional staff to administer SB 2525, since the regulatory requirements for competitive gas service are similar to those that already exist for competitive electric service.

ICC STAFF REBUTTAL

It has never been Staff’s position that a potential revenue impact of SB 2525 was at issue.

As for MEC’s argument that the right to engage in “competitive” sales will not take additional regulatory effort, MEC’s contention that Commission Staff capability is infinitely flexible and that regulatory supervision and oversight of a utility engaging in both tarified and “competitive” sales is no additional work is completely fallacious. SB 2525 simply invites the possibility that MEC will cross-subsidize its competitive sales with its utility sales: in fact, Staff’s examination of the first case being litigated in which that issue has arisen has determined that such a cross-subsidy has existed. Preventing that realistic possibility necessarily strains Staff’s resources and diverts scarce resources. Staff is currently involved in two major PGA reconciliation cases, and a rate case, which are currently being litigated as well as the electric restructuring efforts (including the inevitable rate cases that will commence beginning in 2006).

MEC Statement

The ICC Staff argues that the ICC cannot do its job and protect consumers against cross-subsidization and discrimination. STAFF'S ARGUMENT IS NOT CREDIBLE.

- For nearly a century, the ICC has protected consumers from discrimination and cross-subsidization. There is no reason to believe the ICC is suddenly incapable of protecting consumers.

SB 2525 includes new consumer protections. In fact, this legislation will impose more ICC regulation upon MidAmerican's competitive gas business than any other gas competitor serving Illinois customers.

ICC STAFF REBUTTAL

Staff only recently became aware of the 'competitive division' within MEC's regulated utility. MEC is proud of the fact that it engaged in those sales for decade before it was detected by the Staff. Staff was simply not aware that it needed to protect tariffed customers from being harmed by "competitive" sales activities of utilities because the law did not permit that activity, as confirmed by the Commission in its order in MEC's case (Docket 03-0659, Order, p. 22). The thinner the "wall" between the utility ratepayer sales and the utility 'competitive' sales, the more difficult and expensive it is to monitor that activity. Clearly, overriding the veto of SB 2525 will make it much more difficult to protect against cross-subsidy. This is compounded by the fact that the level of regulation being proposed in SB 2525 is only superficial and is insufficient to protect tariffed customers from adverse economic consequences of MEC's "competitive operations."

Staff is presently engaged in three litigated proceedings to determine the degree to which those "competitive" sales may have resulted in subsidies flowing from tariffed ratepayers to "competitive" customers. Staff anticipates requesting that the Commission order refunds to regulated gas sales customers to reflect the higher gas costs imposed upon them by MEC's competitive sales.

**ICC STAFF RESPECTFULLY REQUESTS YOUR SUPPORT IN
UPHOLDING THE GOVERNOR'S VETO OF SB 2525**